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DEPARTMENT OF THE TREASURY

31 CFR Part 40

RIN 1505-AC54

Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance from the Department of the Treasury

AGENCY: Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule would set out the Department of the Treasury (Treasury) rules for implementing section 504 of the Rehabilitation Act of 1973, as amended (section 504), for Treasury's programs offering Federal financial assistance. Section 504 prohibits discrimination on the basis of disability in programs or activities receiving Federal financial assistance. Section 504 and the section 504 coordination regulation (coordination regulation) require that all agencies that extend Federal financial assistance issue agency-specific regulations implementing section 504. Treasury recipients have been subject to section 504 since its effective date in 1973. Accordingly, today's proposed rule would not substantially change the existing duty of recipients of financial assistance from Treasury to refrain from discrimination on the basis of disability. This proposed rule fulfills the obligation of Treasury to issue agency-specific rules under the law, clarifies the responsibilities of recipients of financial assistance from Treasury under section 504, and describes the Treasury investigation and enforcement procedures to ensure compliance. The proposed regulation is consistent with the ADA Amendments Act of 2008 (ADA Amendments Act), which amended section 504.

DATES: Comments must be received on or before [INSERT DATE THAT IS 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Members of the public are invited to submit comments on all aspects of this proposed rule. Comments on this proposed rule should be sent to Mariam G. Harvey, Director, Office of Civil Rights and Diversity (OCRD), Department of Treasury, 1500 Pennsylvania Avenue, N.W., Washington, DC 20220. Comments may be submitted through www.regulations.gov. The Department encourages electronic submission of comments via www.regulations.gov. Brief comments (maximum five pages) may be submitted by facsimile machine (FAX) to (202) 622-0367. Receipt of submissions, whether online, by mail or FAX transmittal, will not be acknowledged; however, the sender may request confirmation that a submission has been received by telephoning OCRD at (202) 622-1160 (VOICE) or (202) 622-7104 (TTY/TDD).

In general, comments received will be posted to Regulations.gov without change, including any business or personal information provided. Please submit only information appropriate for public disclosure. Copies of this proposed rule in the alternative formats of large print and electronic file on computer disk are available upon request. To obtain the proposed rule in an alternative format, contact OCRD at the telephone and address listed above.

FOR FURTHER INFORMATION CONTACT: Lydia E. Aponte, Civil Rights Program Manager, OCRD, (202) 622-8335 (VOICE) or (202) 622-7104 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

This proposed rule implements section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended, which provides that no otherwise qualified individual with a disability

in the United States shall, “solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency” Here, the Department of the Treasury will be issuing section 504 federal financial assistance regulations for the first time. This proposed rule has been reviewed by DOJ in the exercise of its section 504 coordination authority under Executive Order 12250.

II. OVERVIEW OF PROPOSED RULE

This proposed rule is designed to fulfill Treasury’s statutory and regulatory obligations to issue regulations implementing the federal financial assistance requirements of section 504 that conform to and are consistent with the coordination regulation found at 28 CFR part 41. Treasury, as described below, is proposing language to set forth the 504 requirements for recipients of federal financial assistance that include addressing circumstances unique to Treasury or current applicable statutory requirements. The proposed rule sets forth section 504’s prohibitions on discrimination based on disability in programs or activities receiving financial assistance from Treasury. It also elaborates on investigation, conciliation, and enforcement procedures. It clarifies that Treasury enforcement would be conducted by the Office of Civil Rights and Diversity (OCRD), part of the Office of the Assistant Secretary for Management. OCRD enforces all civil rights laws applicable to entities receiving financial assistance from Treasury. Treasury invites public comment on all aspects of this proposed rule and will take those comments into account before publishing a final rule.

Summary of Key Provisions

Subpart A – General

Subpart A provides the proposed rule's purpose, application, definitions, and enforcement mechanisms. The purpose of the proposed rule is to effectuate section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of disability in programs or activities that receive financial assistance from the Department of the Treasury. These regulations will apply to all programs or activities that receive financial assistance from Treasury, such as awardees and grantees under various Community Development Financial Institution Fund programs and recipients of Treasury's Volunteer Income Tax Assistance Program.

Treasury has proposed incorporating by reference DOJ's updated regulation on the ADA Amendments Act regarding the meaning and interpretation of the definition of disability (see 28 CFR 35.108). The ADA Amendments Act of 2008 (the ADA Amendments Act or the Act) was signed into law on September 25, 2008, with a statutory effective date of January 1, 2009. Public Law 110–325, sec. 8, 122 Stat. 3553, 2559 (2008). The Act made important changes to the meaning and interpretation of the ADA definition of the term “disability” in order to effectuate the intent of Congress to restore the broad scope of the ADA by making it easier for an individual to establish that he or she has a disability within the meaning of the statute. The ADA Amendments Act also amended the Rehabilitation Act of 1973 to conform the section 504 definition of disability, at 29 U.S.C. 705(20)(B), to the ADA. Incorporating the changes to the meaning and interpretation of the definition of disability introduced by the ADA Amendments Act will promote greater consistency among federal agencies' section 504 regulations and reduce the potential for confusion for entities that are covered by section 504 and titles II (nondiscrimination in state or local government services) or III (nondiscrimination by public accommodations and commercial facilities) of the ADA. In addition, the proposed rule

incorporates DOJ's Appendix which provides extensive guidance interpreting the definition of disability.

Treasury also incorporates a definition for auxiliary aids and services that is consistent with the ADA title II requirements for effective communication and includes updated examples of auxiliary aids and services from the DOJ title II regulations at 28 CFR part 35. Treasury's definitions are intended to promote more clarity and consistency with current applicable law and regulations.

Treasury proposes a substantive non-discrimination provision in § 40.4 to include requirements for recipient provision of effective communication with applicants, beneficiaries, members of the public, and companions with disabilities. This is consistent with the current application of section 504 and the DOJ title II regulations.

Subpart A also includes a provision, at § 40.4(j), requiring recipients to provide reasonable accommodations by making changes to policies, practices or procedures when necessary to avoid discrimination on the basis of disability, unless the covered entity can show that the accommodations would result in a fundamental alteration in the nature of its service, program, or activity or impose undue financial and administrative burdens. The obligation to modify policies, practices or procedures was first enunciated by the Supreme Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), which held that while section 504 prohibits the exclusion of an otherwise qualified individual with a disability from participation in a federally funded program solely by reason of the individual's disability, that person is not protected by section 504 if, in order to meet reasonable eligibility standards, the person needs program or policy modifications that would fundamentally alter the nature of the provider's program. Because the *Davis* Court analyzed the case in terms of the proper

interpretation of the statutory term “otherwise qualified,” agency section 504 regulations promulgated immediately after *Davis* addressed the obligation to provide reasonable accommodations outside of the employment arena by defining “qualified handicapped person,” as one who meets the essential eligibility requirements of the program and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature. *See, e.g.*, 28 CFR 39.103 (the Department of Justice’s section 504 federally conducted regulation).

Subsequently, in *Alexander v. Choate*, 469 U.S. 287 (1985), which addressed a section 504 challenge to a state policy reducing the annual number of days of inpatient hospital care covered by the state’s Medicaid program, the Supreme Court implicitly acknowledged that the obligation to provide reasonable accommodations could be considered as an affirmative obligation, noting, “the question of who is ‘otherwise qualified’ and what actions constitute ‘discrimination’ under the section would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications [accommodations] in its programs for the needs of the handicapped.” *Alexander*, 469 U.S. at 300 n.19.

Alexander also introduced the concept of undue financial and administrative burden as a limitation on the reasonable accommodation obligation. In responding to the petitioners’ contention that *any* durational limitation on inpatient coverage in a state Medicaid plan is a violation of section 504, the court stated “[i]t should be obvious that the administrative costs of implementing such a regime would be well beyond the accommodations that are required under *Davis*.” *Alexander*, 469 U.S. at 308.

In the past decades, in keeping with these Supreme Court decisions, federal courts and federal agencies have regularly acknowledged federal agencies' affirmative obligation to ensure that recipients provide qualified individuals with disabilities reasonable accommodations in programs and activities unless the recipient can demonstrate that making these accommodations would fundamentally alter the program or activity or result in an undue financial and administrative burden. However, traditionally, agencies' section 504 regulations have lacked a specific provision implementing this requirement outside of the employment arena. The proposed incorporation of a reasonable accommodation provision is meant to fill this gap. The proposed rule also includes a prohibition on associational discrimination, at § 40.4(k), to ensure that persons who have a relationship with or are otherwise associated with individuals with disabilities are protected from discrimination.

This proposed rule contains requirements that recipients of Treasury assistance submit assurance of compliance with these regulations at § 40.5; that recipients with more than 50 employees designate at least one person to coordinate compliance with these regulations at § 40.6; and that recipients with more than 50 employees take appropriate initial and continuing steps to notify participants, beneficiaries, applicants and employees that they do not discriminate on the basis of disability in violation of section 504 and these proposed regulations at § 40.7.

Consistent with the requirements in the section 504 coordination regulation, § 40.8 of this proposed rule requires recipients to conduct self-evaluations, with the assistance of interested persons, including individuals with disabilities, of their compliance with section 504 within one year of the effective date of this regulation. Treasury recognizes the value of a self-evaluation process to obtain meaningful feedback from the community affected by this regulation and to promote effective and efficient implementation of section 504.

Subpart B – Employment Practices

Subpart B applies section 504's prohibition of discrimination on the basis of disability as it relates to the employment practices of recipients of Treasury financial assistance and recipient relationships with third parties. In particular, this regulation conforms to the Rehabilitation Act Amendments of 1992 (Pub. L. 102-569, sec 506), which amended the Rehabilitation Act to make the same employment standards set forth in title I of the ADA apply to employment discrimination under section 504. The proposed rule references the standards applied under title I of the ADA of 1990 (42 U.S.C. 12111 et seq.), and the Equal Employment Opportunity Commission's ADA title I regulation at 29 CFR § 1630, as amended.

Subpart C – Program Accessibility

Subpart C applies section 504's prohibition of discrimination on the basis of disability as it relates to both existing facilities and newly-constructed facilities of recipients of financial assistance from Treasury. Recipients of financial assistance from Treasury must operate each service, program or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. The Department has included a safe harbor for recipients who have not altered existing facilities on or after the effective date of this rule and that comply with the corresponding technical and scoping specifications for those elements in the Uniform Federal Accessibility Standards (UFAS), Appendix A to 41 CFR part 101–19.6, 49 FR 31528, app. A (Aug. 7, 1984). These facilities are not required to be modified to be brought into compliance with the requirements set forth in the 2010 ADA Standards for Accessible Design (the 2004 ADAAG (the requirements set forth in appendices B and D to 36 CFR part 1191 (2009)), and the requirements contained in 28 CFR 35.151). This will likely

apply to recipients who previously complied with UFAS on their own or because of other regulatory requirements, such as titles II or III of the ADA.

If construction of a recipient's facility commences after the effective date of this regulation, the facility must be designed and constructed so that it is readily accessible to and usable by persons with disabilities. Generally, new construction and alterations by recipients that are private entities in which the last application for a building permit or permit extension is certified to be complete one year after publication of this rule as final in the Federal Register or if no permit is required, if the start of physical construction is one year from the publication of the final rule, must comply with the 2010 Standards as defined in this rule. New construction and alterations by recipients that are public entities that commence one year after the publication of this rule as final in the Federal Register must comply with the 2010 Standards.

Subparts D and E – Compliance, Investigations and Procedure for Effecting Compliance; and Hearings and Decisions

As required by section 504, Subparts D and E describe procedures for complaint processing, compliance, investigations, and enforcement consistent with the remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 (42. U.S. C.A. § 2000d). See 29 U.S.C. 794a.

III. PROCEDURAL DETERMINATIONS

Executive Order 12067

The Equal Employment Opportunity Commission has reviewed this proposed rule pursuant to Executive Order 12067.

Executive Order 12866

This regulatory action is not a “significant regulatory action” under Executive Order 12866, “Regulatory Planning and Review,” 58 FR 51735 (October 4, 1993). Accordingly, this rule is not subject to review under the Executive Order by the Office of Information and Regulatory Affairs within the Office of Management and Budget.

Executive Order 13175

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

Unfunded Mandates Reform Act of 1995

The Department certifies that no actions were deemed necessary under the Unfunded Mandates Reform Act of 1995. Furthermore, these regulations will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and they will not significantly or uniquely affect small governments.

The Regulatory Flexibility Act

The Department, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., has reviewed these regulations and certifies that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that recipients of federal financial assistance have been subject to section 504 and the coordination regulation since their effective date in 1973. Accordingly, this proposed rule would not substantially change the existing duty of recipients of financial assistance from Treasury to refrain from discrimination on the basis of disability. This proposed rule would merely fulfill the

obligation of the Department to issue agency-specific rules under the law; the rule clarifies the responsibilities of recipients of financial assistance from Treasury under section 504 and describes the Department's investigation and enforcement procedures to ensure compliance. In particular, this rule codifies requirements for a transition plan and self-evaluation as outlined in the coordination regulation (28 CFR part 41). The transition plan and self-evaluation demonstrate an entity's compliance with section 504 and are anticipated to have minimal economic burden. Further, the rule likely would apply only to entities receiving federal financial assistance from the Department, which likely would only include a small number of entities in each industry and therefore would not be expected have an impact on a substantial number of small entities in any industry.

Notwithstanding this certification, the Department welcomes comments on the impacts of this rule on small entities.

Executive Order 13132

These regulations will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Department has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Paperwork Reduction Act

Under the Paperwork Reduction Act (44 U.S.C. chapter 35), an agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a valid control number issued by the Office of Management and Budget (OMB). The information

collections contained in this proposed rule will be submitted and approved by OMB in connection with information collections for the applicable programs listed below.

The information collections contained in this proposed rule are found in §§ 40.5 (assurances), 40.8 (self-evaluation), 40.203(transition plan), and 40.300 (compliance information).

The OMB control numbers that will be revised include the following:

Bureau/Office	Program or Activity	OMB Control Numbers
Departmental Offices, Office of Domestic Finance, Office of Financial Institutions	Community Development Financial Institutions (CDFI) Fund – Financial Component	1559-0021
Departmental Offices, Office of Domestic Finance, Office of Financial Institutions	Community Development Financial Institutions (CDFI) Fund – Technical Assistance Component	1559-0021
Departmental Offices, Office of Domestic Finance, Office of Financial Institutions	Bank Enterprise Award Program	1559-0032, 1559-0005
Departmental Offices, Office of Domestic Finance, Office of Financial Institutions	Native American Community Development Financial Institutions (CDFI) Assistance Program, Financial Assistance (FA) Awards	1559-0021

Departmental Offices, Office of Domestic Finance, Office of Financial Institutions	Native American Community Development Financial Institutions (CDFI) Assistance (NACA) Program, Technical Assistance Grants	1559-0021
Departmental Offices, Office of Domestic Finance, Office of Financial Institutions	Community Development Financial Institutions Fund, Capital Magnet Fund	1559-0043
Departmental Offices, Office of Domestic Finance, Office of Small Business, Community Development, and Housing Policy	State Small Business Credit Initiative	1505-0227
Internal Revenue Service	Tax Counseling for the Elderly Grant Program	1545-2222
Internal Revenue Service	Volunteer Income Tax Assistance Program	1545-2222
Internal Revenue Service	Volunteer Income Tax Assistance Grant Program	1545-2222
Internal Revenue Service	Low Income Taxpayer Clinic Grant Program	1545-1648
United States Mint	U.S. Commemorative Coin Programs	TBD

Departmental Offices, Treasury Executive Office for Asset Forfeiture	Equitable sharing program (transfer of forfeited property to state and local law enforcement agencies)	1505-0152
Departmental Offices, Office of the Fiscal Assistant Secretary	Grants under the RESTORE Act's Direct Component and Centers of Excellence program	1505-0250

Comments on the collection of information should be sent to the Office of Management and Budget, Attention: Desk Officer for the Department of Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, or e-mail to OIRA_Submission@OMB.EOP.gov with copies to the Department of Treasury at the addresses specified in the ADDRESSES section. Comments on the information collection should be submitted no later than [Insert 60 days after publication in the Federal Register]. Comments are specifically requested concerning:

(1) Whether the proposed information collection is necessary for the proper performance of agency functions, including whether the information will have practical utility;

(2) The accuracy of the estimated burden associated with the proposed collection of information, including the validity of the methodology and assumptions used (see below);

(3) How to enhance the quality, utility, and clarity of the information required to be maintained; and

(4) How to minimize the burden of complying with the proposed information collection, including the application of automated collection techniques or other forms of information technology.

List of subjects in 31 CFR Part 40

Civil rights.

For the reasons stated in the preamble, the Department of the Treasury proposes to add Part 40 to Title 31 of the Code of Federal Regulations to read as follows:

PART 40- NONDISCRIMINATION ON THE BASIS OF DISABILITY IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE FROM THE DEPARTMENT OF THE TREASURY

Subpart A – General Provisions

Sec.

- 40.1 Purpose, broad coverage and effective date.
- 40.2 Applicability.
- 40.3 Definitions.
- 40.4 Discrimination prohibited.
- 40.5 Assurances required.
- 40.6 Designation of responsible employee and adoption of grievance procedures.
- 40.7 Notice of nondiscrimination and accessible services.
- 40.8 Remedial action, voluntary action, and self-evaluation.
- 40.9 Effect of state or local law or other requirements.
- 40.10 Effect of compliance with regulations of other Federal agencies.

Subpart B - Employment Practices

40.101 Applicability.

40.102 Discrimination prohibited.

Subpart C – Program Accessibility

40.201 Applicability.

40.202 Discrimination prohibited.

40.203 Existing facilities.

40.204 New construction and alterations.

Subpart D – Compliance, Investigations and Procedure for Effecting Compliance

40.300 Compliance information.

40.301 Conduct of investigations.

40.302 Procedure for effecting compliance.

Subpart E – Hearings and Decisions and Notices

40.400 Hearings.

40.401 Decisions and notices.

Authority: 29 U.S.C. 701-796; 31 U.S.C. 321

Subpart A – General Provisions

§ 40.1 Purpose, broad coverage, and effective date.

(a) Purpose. The purpose of this part is to implement section 504 of the Rehabilitation Act of 1973, as amended, which provides that no otherwise qualified individual with a disability in the United States shall solely by reason of his or her disability be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of the Treasury.

(b) Broad Coverage. Consistent with the purpose of the ADA Amendments Act of 2008 of reinstating a broad scope of protection under the Americans with Disabilities Act and section

504, the definition of “disability” applicable to this part shall be construed broadly in favor of expansive coverage. The primary object of attention in cases brought under this part should be whether entities covered under section 504 have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability should not demand extensive analysis.

(c) Effective date. This part is effective on [30 days after publication of the final rule].

§ 40.2 Applicability.

This part applies to all programs or activities that receive Federal financial assistance provided by the Department of the Treasury after the effective date of this part, whether or not the assistance was approved before the effective date and whether or not a recipient’s grant or award documents reference the obligation to comply with section 504.

§ 40.3 Definitions.

2004 ADAAG means the requirements set forth in appendices B and D to 36 CFR part 1191 (2009).

2010 Standards means the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in 28 CFR 35.151.

The Act means the Rehabilitation Act of 1973, Public Law 93-112, 87 Stat. 390 (1973), as amended. The Act appears at 29 U.S.C. 701-796.

Applicant means one who submits an application, request, or plan required to be approved by the designated Department official or by a primary recipient as a condition to becoming a recipient.

Auxiliary aids and services means services or devices that enable persons with sensory, manual, or speech disabilities to have an equal opportunity to participate in, and enjoy the benefits of, the recipient's programs or activities. Auxiliary aids and services include:

(1) Qualified interpreters on-site or through video remote interpreting (VRI) services; note takers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

(2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

Department means the Department of the Treasury and includes each of its operating bureaus and other organizational units.

Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a change to policies, practices or procedures, or by the provision of auxiliary aids or services, as provided in § 40.4(l) of this part.

Disability has the same meaning as that given in 28 CFR part 35.

Drug means a controlled substance as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

Facility means all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, rolling stock or other conveyances, including the site where the building, property, structure, or equipment is located, or other real or personal property or interest in such property.

Federal financial assistance means any grant, contract (other than a direct Federal procurement contract or a contract of insurance or guaranty), subgrant, contract under a grant, cooperative agreement, formula allocation, loan, or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

- (a) Funds;
- (b) Services of Federal personnel;
- (c) Real and personal property or any interest in such property, including:

(1) A sale, transfer, lease or use (other than on a casual or transient basis) of Federal property for less than fair market value, for reduced consideration or in recognition of the public nature of the recipient's program or activity; or

(2) Proceeds from a subsequent sale, transfer or lease of Federal property if the Federal share of its fair market value is not returned to the Federal government; or

(3) Any other thing of value by way of grant, loan, contract, or cooperative grant.

Historic preservation programs means programs conducted by recipients of Federal financial assistance that have preservation of historic properties as a primary purpose.

Historic properties means those buildings or facilities that are eligible for listing in the National Register of Historic Places, or such properties designated as historic under a statute of the appropriate state or local government body.

Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21.U.S.C. 812). The term illegal use of drugs does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Individual with a disability means any person who has a disability. (The term individual with a disability does not include an individual who is currently engaging in the illegal use of drugs, when the recipient acts on the basis of such use.)

Primary recipient means any recipient that is authorized or required to extend Federal financial assistance to another recipient.

Program or activity means all of the operations of any entity described below, any part of which is extended Federal financial assistance:

(a)(1) A department, agency, special purpose district, or other instrumentality of a state or of a local government; or

(2) The entity of such state or local government that distributes Federal financial assistance and each such department or agency (and each other state or local government entity) that is the recipient of Federal financial assistance, in the case of assistance to a state or local government; or

(b)(1) A college, university, or other postsecondary institution, or a public system of higher education; or

(2) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system; or

(c)(1) An entire corporation, partnership, or other private organization, or an entire sole proprietorship if—

(i) Assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) The corporation, partnership, private organization, or sole proprietorship is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(2) The entire plant or other comparable, geographically separate physical facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship that is the recipient of Federal financial assistance; or

(d) Any other entity which is established by two or more of the entities described in paragraphs (a), (b) or (c) of this paragraph.

Qualified individual with a disability means

(a) With respect to any aid, benefit, or service, provided under a program or activity subject to this part, an individual with a disability who, with or without reasonable accommodations in rules, policies, or procedures, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids or services, meets the essential eligibility requirements for participation in, or receipt from, that aid, benefit, or service; and

(b) With respect to employment, the definition given that term in the Equal Employment Opportunity Commission's regulation at 29 CFR part 1630, implementing title I of the Americans with Disabilities Act of 1990, which regulation is made applicable to this part by § 40.101 and § 40.102.

Qualified interpreter means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.

Qualified reader means a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary.

Recipient means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

Secretary means the Secretary of the Treasury or any officer or employee of the Department to whom the Secretary has delegated or may delegate the authority to act under the regulations of this part.

Section 504 means section 504 of the Act, (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794), as amended.

Sub-recipient means an entity to which a primary recipient extends Federal financial assistance.

Ultimate beneficiary is one among a class of persons who are entitled to benefit from, or otherwise participate in, a program or activity receiving Federal financial assistance and to whom the protections of this part extend. The ultimate beneficiary class may be the general public or some narrower group of persons.

Video remote interpreting (VRI) service means an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images as provided in § 40.4(i)(4).

§ 40.4 Discrimination prohibited.

(a) General. No qualified individual shall, solely on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving assistance subject to this part.

(b) Discriminatory actions prohibited.

(1) A recipient may not, in providing any program or activity subject to this part, discriminate on the basis of disability, directly or through contractual, licensing, or other arrangements, on the basis of disability:

(i) Deny a qualified individual with a disability the opportunity accorded others to participate in or benefit from the aid, benefit, or service.

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit or service that is not equal to that afforded to others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Deny a qualified individual with a disability an equal opportunity to participate in the program or activity by providing services to the program;

(v) Provide different or separate aids, benefits, or services to qualified individuals with disabilities or classes of qualified individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities or classes of qualified individuals with disabilities with aids, benefits, or services that are as effective as that provided to others;

(vi) Deny a qualified individual with a disability an opportunity to participate as a member of a planning or advisory board;

(vii) Aid or perpetuate discrimination against a qualified individual with a disability by providing assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the recipient's program;

(viii) Permit the participation in the program or activity of agencies, organizations or persons which discriminate against individuals with disabilities who are beneficiaries in the recipient's program.

(ix) Intimidate or retaliate against any individual, with or without a disability, for the purpose of interfering with any right secured by section 504 or this part;

(x) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service;

(2) A recipient may not deny a qualified individual with a disability the opportunity to participate in any programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A recipient may not, directly or through contractual, licensing, or other arrangements, utilize criteria or methods of administration that:

(i) have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to individuals with disabilities;
or

(iii) perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(4) A recipient may not, in determining the site or a location of a facility, make selections—

(i) that have the purpose or effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination on the basis of disability; or

(ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to individuals with disabilities.

(5) A recipient is prohibited from discriminating on the basis of disability in aid, benefits, or services in programs or activities operating without Federal financial assistance where such action would discriminate against individuals with disabilities who are beneficiaries or participants in any program or activity of the recipient receiving Federal financial assistance from this Department.

(6) An entity not otherwise receiving Federal financial assistance but using a facility provided with the aid of Federal financial assistance from this Department after the effective date of this part is prohibited from discriminating on the basis of disability.

(7) A recipient, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(8) A recipient may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor

may a recipient establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a recipient are not, themselves, covered by this part unless those entities are also recipients of federal financial assistance from this Department.

(c) The exclusion of individuals without disabilities or specified classes of individuals with disabilities from aid, benefits, or services limited by Federal statute or executive order to individuals with disabilities or a different class of individuals with disabilities is not prohibited by this part.

(d) Nothing in this part prohibits a recipient from providing aid, benefits, or services to individuals with disabilities or to a particular class of individuals with disabilities beyond those required by this part.

(e) Integrated Setting. Recipients shall administer programs or activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(f) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under section 504 or this part which such individual chooses not to accept.

(g) A recipient may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids, reasonable accommodations, or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(h) Illegal Use of Drugs.

(1) General. Except as provided in subparagraph (3) of this section, this part does not prohibit discrimination against an individual based on that individual's current use of illegal drugs.

(2) A recipient shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who —

(i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;

(ii) Is participating in a supervised rehabilitation program; or

(iii) Is erroneously regarded as engaging in such use.

(3) Health and drug rehabilitation services.

(i) A recipient shall not deny health services, or services provided in connection with drug rehabilitation, to an individual on the basis of that individual's current illegal use of drugs, if the individual is otherwise entitled to such services.

(ii) A drug rehabilitation or treatment program may deny participation to individuals who engage in illegal use of drugs while they are in the program.

(4) Drug testing.

(i) This part does not prohibit a recipient from adopting or administering reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs.

(ii) Nothing in paragraph (4) of this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

(i) Communications.

(1) (i) A recipient shall take appropriate steps to ensure that communications with applicants, participants, beneficiaries, members of the public, and companions with disabilities are as effective as communications with others.

(ii) For purposes of this section, “companion” means a family member, friend, or associate of an individual seeking access to a program or activity of a recipient, who, along with such individual, is an appropriate person with whom the recipient should communicate.

(2) (i) A recipient shall furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a recipient.

(ii) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a recipient entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

(3) (i) A recipient shall not require an individual with a disability to bring another individual to interpret for him or her.

(ii) A recipient shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication except—

(A) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or

(B) Where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.

(iii) A recipient shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.

(4) Video remote interpreting (VRI) services. A recipient that chooses to provide qualified interpreters via VRI services shall ensure that it provides—

(i) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;

(ii) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, and can be seen by the participating individual regardless of the individuals' body position.

(iii) A clear, audible transmission of voices; and

(iv) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

(5) Where a recipient communicates by telephone with applicants, participants, beneficiaries and members of the public, text telephones (TTYs) or equally effective telecommunications systems shall be used to communicate with individuals who are deaf or hard of hearing or have speech impairments.

(6) When a recipient uses an automated-attendant system, including, but not limited to, voice mail and messaging, or an interactive voice response system, for receiving and directing incoming telephone calls, that system must provide effective real-time communication with individuals using auxiliary aids and services, including TTYs and all forms of FCC-approved telecommunications relay system, including Internet-based relay systems.

(7) A recipient shall respond to telephone calls from a telecommunications relay service established under title IV of the ADA in the same manner that it responds to other telephone calls.

(8) This section does not require the recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where the recipient believes that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the recipient has the burden of proving that compliance with § 40.4(i) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the recipient agency or the agency head's designee after considering all of the recipient's resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply

with this section would result in such an alteration or such burdens, the recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits and services of the program or activity.

(j) Reasonable accommodations. (1) A recipient shall make reasonable accommodations in policies, practices, or procedures when such accommodations are necessary to avoid discrimination on the basis of disability, unless the recipient can demonstrate that making the accommodations would fundamentally alter the nature of the service, program, or activity or result in an undue financial and administrative burden. For purposes of this section, the term reasonable accommodation shall be interpreted in a manner consistent with the term “reasonable modifications” as set forth in the Americans with Disabilities Act Title II regulation at 28 CFR 35.130(b)(7), and not as it is defined or interpreted for the purposes of employment discrimination under Title I of the ADA (42 U.S.C. 12111-12112) and its implementing regulation at 29 CFR part 1630.

(2) A recipient is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the “regarded as” prong of the definition of disability at § 40.3, definition of disability,

(k) Prohibition on associational discrimination. A recipient shall not exclude or otherwise deny aids, benefits, or services of its programs or activities to an individual because of that individual’s relationship or association with an individual with a known disability.

(1) Direct Threat. (1) This part does not require a recipient to permit an individual to participate in or benefit from the services, programs, or activities of that recipient when that individual poses a direct threat to the health or safety of others.

(2) In determining whether an individual poses a direct threat to the health or safety of others, a recipient must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable accommodations in policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

(m) Claims of no disability. Nothing in this subpart shall provide the basis for a claim that an individual without a disability was subject to discrimination because of a lack of disability, including a claim that an individual with a disability was granted a reasonable accommodation that was denied to an individual without a disability.

§ 40.5 Assurances required.

(a) Assurances. Either at the application stage or the award stage, an applicant for federal financial assistance to which this part applies shall submit an assurance that the program or activity will be operated in compliance with this part.

(b) Duration of obligation. (1) In the case where the Federal financial assistance is to provide or is in the form of personal property, real property or an interest therein or structures thereon, the assurance shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, for the period during which the property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services

or benefits, or for as long as the recipient retains ownership or possession of the property, whichever is longer. In all other cases the assurance shall obligate the recipient for the period during which federal financial assistance is extended to the program.

(2) In the case where Federal financial assistance is provided in the form of a transfer of real property, structures, or improvements thereon, or interest therein, from the Federal government, the instrument effecting or recording the transfer shall contain a covenant running with the land assuring nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. Where no transfer of property or interest therein from the Federal government is involved, but property is acquired or improved with Federal financial assistance, the recipient shall agree to include such covenant in any subsequent transfer of such property. When the property is obtained from the Federal government, such covenant may also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant where, in the discretion of the designated agency official, such a condition and right of reverter is appropriate to the statute under which the real property is obtained and to the nature of the grant and the grantee. In such event if a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on such property for the purposes for which the property was transferred, the designated agency official may agree, upon request of the transferee and if necessary to accomplish such financing, and upon such conditions as the designated agency official deems appropriate, to subordinate such right of reversion to the lien of such mortgage or other encumbrance.

(c) Continuing Federal financial assistance. Every application by a state or a state agency for continuing Federal financial assistance to which this part applies shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application:

(1) Contain, be accompanied by, or be covered by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this part; and

(2) Provide, be accompanied by, or be covered by provision for such methods of administration for the program as are found by the designated agency official to give reasonable guarantee that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this part.

(d) Assurance from institutions. (1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for special training projects, for student loans or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required with respect to an institution of higher education, hospital, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, patients, or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution.

(e) Form. (1) The assurances required by paragraph (a) of this section, which may be included as part of a document that addresses other assurances or obligations, shall include that the applicant or recipient will comply with all applicable Federal statutes relating to nondiscrimination. This includes but is not limited to: section 504 of the Rehabilitation Act of 1973, as amended.

(2) The designated agency official will specify the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest. Any such assurance shall include provisions which give the United States a right to seek its judicial enforcement.

§ 40.6 Designation of responsible employee and adoption of grievance procedures.

(a) Designation of responsible employee. A recipient that employs fifty or more persons shall designate at least one person to coordinate compliance with this part.

(b) Adoption of grievance procedures. A recipient that employs fifty or more persons shall adopt grievance procedures that incorporate appropriate due process standards (e.g. adequate notice, fair hearing) and provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part except that such procedures need not be established with respect to complaints from applicants for employment. Any individual may file a complaint with the Department without having first used the recipient's grievance procedures.

(c) The Secretary may require any recipient with fewer than fifty employees to designate a responsible employee, comply with the requirements for providing notice of nondiscrimination, and adopt grievance procedures when the Secretary finds a violation of this part or finds that complying with these administrative requirements will not significantly impair the ability of the recipient to provide benefits or services.

§ 40.7 Notice of nondiscrimination and accessible services.

(a) A recipient employing fifty or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those who are blind or have low vision or deaf or hard of hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of disability in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or participation in, or employment in, its programs or activities. The recipient shall also identify the responsible employee designated pursuant to § 40.6(a), where to file section 504 complaints with the Department, and where applicable, with the recipient, and identify the existence and location of accessible services, activities, and facilities. A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include but are not limited to the posting of notices, placement of notices in the recipient's publications, publication of notices on the recipient's website, publication in newspapers or magazines, radio announcements, and the use of other visual and aural media.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this

paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§ 40.8 Remedial action, voluntary action, and self-evaluation.

(a) Remedial action. (1) If the Secretary finds that a recipient has discriminated against individuals on the basis of disability in violation of section 504 or this part, the recipient shall take such remedial action as the Secretary deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against individuals on the basis of disability in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Secretary, where appropriate, may require either or both recipients to take remedial action.

(3) The Secretary may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action:

(i) With respect to individuals with disabilities who are no longer participants in the recipient's program or activity but who were participants in the program when such discrimination occurred;

(ii) With respect to individuals with disabilities who would have been participants in the program or activity had the discrimination not occurred, or;

(iii) With respect to individuals with disabilities presently in the program or activity, but not receiving full benefits or equal and integrated treatment within the program.

(b) Voluntary action. A recipient may take steps, in addition to any action that is required by this part, to increase the participation of qualified individuals with disabilities in the recipient's program or activity.

(c) Self-evaluation. (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including individuals with disabilities or organizations representing individuals with disabilities, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part.

(ii) Modify, after consultation with interested persons, including individuals with disabilities or organizations representing individuals with disabilities, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including individuals with disabilities or organizations representing individuals with disabilities, appropriate remedial steps to eliminate the effects of any discrimination that resulted in adherence to these policies and practices.

(2) A recipient employing fifty or more persons shall, for at least three years following completion of the evaluation required under paragraph (c) (1) of this section, maintain on file, make available for public inspection, and provide to the Secretary upon request:

(i) A list of the interested persons consulted,

(ii) A description of areas examined and any problems identified, and

(iii) A description of any modifications made and of any remedial steps taken.

§ 40.9 Effect of state or local law or other requirements.

The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of disability, imposes prohibitions or limits upon the eligibility of qualified individuals with disabilities to receive services or to participate in any program or activity.

§ 40.10 Effect of compliance with regulations of other Federal agencies.

A recipient that has designated a responsible official and established a grievance procedure, provided notice, completed a self-evaluation, or prepared a transition plan in the course of complying with regulations issued by other Federal agencies under section 504 or title II of the Americans with Disabilities Act will be in compliance with §§ 40.6, 40.7, 40.8(c), or 40.203(f), respectively, if all requirements of those sections have been met in regard to programs or activities assisted by this Department.

Subpart B - Employment Practices

§40.101 Applicability.

This part applies to all programs or activities that receive Federal financial assistance provided by the Department.

§ 40.102 Discrimination prohibited

(a) General. No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any program or activity to which this part applies.

(b) Employment discrimination standards. The standards used to determine whether paragraph (a) of this section has been violated shall be the standards applied under Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and, as such sections relate to employment, the provisions of sections 501 through 504 and 510 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as amended by the ADA Amendments Act of 2008 (Pub L. 110-325), as such standards are implemented in the Equal Employment Opportunity Commission's regulation at 29 CFR pt. 1630, as amended. The procedures to be used to determine whether paragraph (a) of this section has been violated shall be the procedures set forth in Subpart D of this part.

Subpart C – Program Accessibility

§ 40.201 Applicability.

This subpart applies to all programs or activities that receive Federal financial assistance provided by the Department after the effective date of this part.

§ 40.202 Discrimination prohibited.

Recipients shall ensure that no qualified individuals with disabilities are denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under any program or activity receiving assistance from this Department because a recipient's facilities are inaccessible to or unusable by individuals with disabilities.

§ 40.203 Existing facilities.

(a) Accessibility. A recipient shall operate each service, program or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not –

(1) Necessarily require a recipient to make each of its existing facilities or every part of an existing facility accessible to and usable by qualified individuals with disabilities;

(2) Require a recipient to take any action that would threaten or destroy the historically significant features of an historic property; or

(3) Require a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the recipient believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a recipient has the burden of proving that compliance with § 40.203(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the director of the recipient entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the recipient.

(b) Methods.

(1) A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 40.204, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs or activities readily accessible to and usable by qualified individuals with a disabilities. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. A recipient, in making alterations to existing buildings, shall meet the accessibility requirements of § 40.204. In choosing among available methods for meeting the requirements of paragraph (a) of this section, a recipient shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(2) Safe harbor. For the purposes of complying with this section, elements that have not been altered in existing facilities on or after [Effective date of the final rule], and that comply with the corresponding technical and scoping specifications for those elements in the Uniform Federal Accessibility Standards (UFAS), Appendix A to 41 CFR part 101–19.6, 49 FR 31528, app. A (Aug. 7, 1984) are not required to be modified to be brought into compliance with the requirements set forth in the 2010 Standards.

(c) Small providers. If a recipient with fewer than fifteen employees finds, after consultation with an individual with a disability seeking its services, that there is no method of complying with paragraph (a) of this section other than by making a significant alteration in its

existing facilities, the recipient may, as an alternative, refer the individual with a disability to other providers of those services that are accessible at an equivalent cost to the beneficiary.

(d) Historic preservation programs. In meeting the requirements of § 40.203(a) in historic preservation programs, a recipient shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to a historic property is not required because of paragraph (a)(2) or (a)(3) of this section, alternative methods of achieving program accessibility include –

(1) Using audio-visual materials and devices to depict those portions of a historic property that cannot otherwise be made accessible;

(2) Assigning persons to guide individuals with disabilities into or through portions of historic properties that cannot otherwise be made accessible; or

(3) Adopting other innovative methods.

(e) Time period. A recipient shall comply with the requirements of paragraph (a) of this section within ninety days of the effective date of this part except that, where structural changes in facilities are necessary, such changes shall be made as expeditiously as possible and no later than within three years of the effective date of this part.

(f) Transition plan. In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including individuals with disabilities or organizations representing individuals with disabilities. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to individuals with disabilities;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full accessibility under paragraph (a) of this section and if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Identify the person responsible for implementation of the plan.

(g) Notice of location of accessible facilities.

(1) General. The recipient shall adopt and implement procedures to ensure that interested persons with disabilities, including persons with an intellectual disability, a learning disability, a vision or hearing disability or other disabilities, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by individuals with disabilities.

(2) Signs at primary entrances. The recipient shall provide signs at a primary entrance to each of its inaccessible facilities, directing users to an accessible facility or a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each accessible entrance of a facility.

§ 40.204 New construction and alterations.

(a) Design and construction. Each new facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction is commenced after the effective date of this part.

(b) Alteration. Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall to the maximum extent feasible be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities.

(c) Accessibility standards and compliance dates.

(1) Applicable Accessibility Standard.

(i) New construction and alterations on or after the compliance dates specified in paragraph (2) must comply with the 2010 Standards.

(ii) New construction and alterations of buildings or facilities undertaken in compliance with the 2010 Standards shall comply with the scoping and technical requirements for a “public building or facility” in the 2010 Standards regardless of whether the recipient is a public or private entity.

(iii) Departures from particular requirements of the Standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(2) Compliance Dates.

(i) New construction and alterations by recipients that are private entities. New construction and alterations in which the last application for a building permit or permit extension for such construction or alterations is certified to be complete by a state, county, or local government (or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the state, county, or local government) is on or after [DATE ONE YEAR AFTER

PUBLICATION OF THE FINAL RULE IN THE **Federal Register**], or if no permit is required, if the start of physical construction or alterations occurs on or after [DATE ONE YEAR FROM THE PUBLICATION OF THE FINAL RULE IN THE **Federal Register**], then such new construction and alterations shall comply with the 2010 Standards as defined in paragraph (1) of this section.

(ii) New construction and alterations by recipients that are public entities. If physical construction or alterations commence on or after [DATE ONE YEAR AFTER PUBLICATION OF THE FINAL RULE IN THE **Federal Register**], then such new construction and alterations shall comply with the 2010 Standards.

(3) For the purposes of this section, ceremonial groundbreaking or razing of structures prior to site preparation will not be considered to commence or start physical construction or alterations.

(4) Compliance with the Architectural Barriers Act of 1968. Nothing in this section or § 40.203 relieves recipients whose facilities are covered by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), from their responsibility of complying with the requirements of that Act and any implementing regulations.

(5) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

Subpart D – Compliance, Investigations and Procedure for Effecting Compliance

§ 40.300 Compliance information.

(a) Cooperation and assistance. The Secretary shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) Compliance reports. Each recipient shall keep such records and submit to the Secretary timely, complete, and accurate compliance reports at such times, and in such form and containing such information, as the Secretary may determine to be necessary to enable the Secretary to ascertain whether the recipient has complied or is complying with this part. In the case in which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part. In general, recipients should have available for the Secretary data showing the extent to which individuals with disabilities are beneficiaries of programs receiving Federal financial assistance.

(c) Access to sources of information. Each recipient shall permit access by the Secretary, during normal business hours, to such of its books, records, accounts, and other sources of information and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution, or person and this agency, institution, or person fails or refuses to furnish this information, the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information.

(d) Information to beneficiaries and participants. Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the program for which the recipient receives Federal financial

assistance and make such information available to them in such manner as the Secretary finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this part.

§ 40.301 Conduct of investigations.

(a) Periodic compliance reviews. The Secretary shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) Complaints. Any person who believes that he or she, or any specific class of persons, has been subjected to discrimination prohibited by this part may by himself or herself, or by a representative, file with the Secretary a written complaint. A complaint must be filed not later than 180 days after the date of the alleged discrimination, unless the time for filing is extended by the Secretary.

(c) Investigations. The Secretary will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation will include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) Resolution of matters.

(1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the Secretary will so inform the recipient and the matter will be resolved

by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 40.302.

(2) If an investigation does not warrant action pursuant to paragraph (d)(1) of this section, the Secretary will so inform the recipient and the complainant, if any, in writing.

(e) Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 504 or this part, or because the individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

§ 40.302 Procedure for effecting compliance.

(a) General. If there appears to be a failure or threatened failure to comply with this part, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to: (1) A referral to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States, or any assurance or other contractual undertaking, and (2) Any applicable proceeding under state or local law.

(b) Noncompliance with § 40.5. If an applicant fails or refuses to furnish an assurance required under § 40.5 or otherwise fails or refuses to comply with a requirement imposed by or

pursuant to that section, Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph. However, the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application approved prior to the effective date of this part.

(c) Termination of or refusal to grant or to continue Federal financial assistance.

(1) No order suspending, terminating, or refusing to grant or continue Federal financial assistance shall become effective until:

(i) The Secretary has advised the applicant or recipient of the applicant's or recipient's failure to comply and has determined that compliance cannot be secured by voluntary means;

(ii) There has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part;

(iii) The action has been approved by the Secretary pursuant to § 40.401(e); and

(iv) The expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action.

(2) Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) Other means authorized by law. No action to effect compliance with section 504 by any other means authorized by law shall be taken by the Department until:

- (1) The Secretary has determined that compliance cannot be secured by voluntary means;
- (2) The recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance; and
- (3) The expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days, additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

Subpart E – Hearings and Decisions and Notices

§ 40.400 Hearings.

(a) Opportunity for hearing. Whenever an opportunity for a hearing is required by § 40.302(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either:

- (1) Fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the Secretary that the matter be scheduled for hearing; or
- (2) Advise the applicant or recipient that the matter in question has been set down for

hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing under this paragraph or to appear at a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under § 40.301(c) and consent to the making of a decision on the basis of such information as is available.

(b) Time and place of hearing. Hearings shall be held at the offices of the Department component administering the program, at a time fixed by the Secretary, unless he or she determines that the convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before the Secretary, or at the Secretary's discretion, before a hearing examiner appointed in accordance with section 3105 of title 5, United States Code, or detailed under section 3344 of title 5, United States Code.

(c) Right to counsel. In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) Procedures, evidence, and record. (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with sections 554 through 557 of title 5, United States Code, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Secretary and the applicant or recipient

shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing.

(2) Technical rules of evidence do not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where determined reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) Consolidated or joint hearings. In cases in which the same or related facts are asserted to constitute noncompliance with this part with respect to two or more Federal statutes, authorities, or other means by which Federal financial assistance is extended and to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under section 504, the Secretary may, by agreement with such other departments or agencies, where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules or procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 40.401.

§ 40.401 Decisions and notices.

(a) Procedure on decisions by hearing examiner. If the hearing is held by a hearing examiner, the hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the Secretary for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient. Where the initial decision is made by the hearing examiner the applicant or recipient may, within 30 days after the mailing of such notice of initial decision, file with the Secretary the applicant's or recipient's exceptions to the initial decision, with the reasons therefore. In the absence of exceptions, the Secretary may, on his or her own motion, within 45 days after the initial decision, serve on the applicant or recipient a notice that he or she will review the decision. Upon the filing of such exceptions or of notice of review, the Secretary shall review the initial decision and issue his or her own decision thereon including the reasons therefore. In the absence of either exceptions or a notice of review, the initial decision shall, subject to paragraph (e) of this section, constitute the final decision of the Secretary.

(b) Decisions on record or review by the Secretary. Whenever a record is certified to the Secretary for decision or he or she reviews the decision of a hearing examiner pursuant to paragraph (a) of this section, or whenever the Secretary conducts the hearing, the applicant or recipient shall be given reasonable opportunity to file with the Secretary briefs or other written statements of its contentions, and a written copy of the final decision of the Secretary shall be sent to the applicant or recipient and to the complainant, if any.

(c) Decisions on record where a hearing is waived. Whenever a hearing is waived pursuant to § 40.400, a decision shall be made by the Secretary on the record and a written copy of such decision shall be sent to the applicant or recipient, and to the complainant, if any.

(d) Rulings required. Each decision of a hearing examiner or the Secretary shall set forth his or her ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) Approval by the Secretary. Any final decision by an official of the Department, other than the Secretary personally, which provides for the suspension or termination of, or the refusal to grant or continue Federal financial assistance, or the imposition of any other sanction available under this part or section 504, shall promptly be transmitted to the Secretary personally, who may approve such decision, may vacate it, or remit or mitigate any sanction imposed.

(f) Content of orders. The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of section 504 and this part, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this part, or to have otherwise failed to comply with this part, unless and until it corrects its noncompliance and satisfies the Secretary that it will fully comply with this part.

(g) Post termination proceedings. (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance

that it will fully comply with this part.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the Secretary to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of paragraph (g)(1) of this section. If the Secretary determines that those requirements have been satisfied, he or she shall restore such eligibility.

(3) If the Secretary denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record in accordance with rules or procedures issued by the Secretary. The applicant or recipient will be restored to such eligibility if it proves at such a hearing that it satisfied the requirements of paragraph (g)(1) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

Kody Kinsley

Assistant Secretary for Management

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